

MARK E. KUPCZAK
Claimant

MIDWEST DRYWALL
Respondent

HARTFORD ACCIDENT & INDEMNITY
Insurance Carrier

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¹ K.S.A. 1998 Supp. 44-534a(2) and K.S.A. 1998 Supp. 44-551(b)(1).

Benefits were terminated because claimant was observed performing physical activities that appeared inconsistent with his alleged injuries and claim of being temporarily and totally disabled. Respondent introduced a videotape showing claimant performing physical activities including loading furniture, boxes and other items into a truck. Claimant's credibility is called into question by his testimony before viewing the videotape wherein he denied having engaged in the type of physical activity depicted on the videotape. Nevertheless, the activity depicted on the videotape is not so strenuous as to be completely inconsistent with this claim. The videotape raises more of a question about claimant's status as being temporarily and totally disabled, a nonjurisdictional issue, than it does about the compensability of his claim. Also, claimant testified at his September 25, 1998 deposition that his condition progressively worsened after he left Wichita and, as a result, he had to further limit his activities.

After his injury at work, claimant initially saw Daniel V. Lygrisse, M.D., who on March 12, 1998 took him off work and referred him to orthopedic surgeon Robert L. Eyster, M.D. He ordered x-rays and, eventually, a myelogram which revealed that the Harrington rods placed in claimant's back during a 1989 surgery had broken. These rods have now been surgically removed.

Respondent does not contest the compensability of the March 6, 1998 accident. Respondent, at the hearing before the ALJ and in its brief to the Board, acknowledges that claimant met with personal injury by accident arising out of and in the course of his employment on March 6, 1998. Before claimant left Wichita for Illinois he had not been released to work and Dr. Eyster was recommending surgery to remove the broken Harrington rods. Dr. Eyster had also provided claimant with a referral to Dr. Amrani for another opinion and surgical consult. Claimant testified that he never saw Dr. Amrani because respondent terminated his medical and temporary total disability benefits. Because he had no income, he had to give up his apartment in Wichita and move in with his mother in Illinois.

The medical records admitted as exhibits to the preliminary hearing transcript are silent as to any subsequent, intervening injury. It does not appear that claimant gave any physician a history of any aggravation after his initial March 6, 1998 accident. When questioned at his deposition, claimant denied suffering any subsequent injury. Other than the fact that claimant was apparently well enough to help with moving items out of his apartment to sell in April 1998, but thereafter continued to seek medical treatment, there is very little evidence in the record to support the notion of a subsequent intervening injury. The contention that claimant's injury was a temporary aggravation and that his condition has now returned to its pre-injury level is likewise unsubstantiated. Claimant was apparently able to perform his delivery job for respondent from October 1996 to March 1998 without significantly aggravating his back condition. There are some indications of back pain in 1997 and early 1998 but not to the point that prevented him from working. That changed with the accident of March 6, 1998. Something caused the rods in his back

to break and it was most likely the event of March 6, 1998 when claimant reported feeling a snap or a pull. Claimant described that "it shot pain up, down, and every which way."

Based upon the record presented, the Appeals Board finds that the condition for which claimant was seeking medical treatment at the April 15, 1999, preliminary hearing is the direct and natural result of his March 6, 1998 accident. The activities claimant has performed since this accident do not establish a separate and distinct injury. Therefore, the Appeals Board finds from the evidence presented that there has not been a subsequent, intervening injury. The condition for which claimant seeks treatment arose out of and in the course of his employment with respondent.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish dated April 16, 1999, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 1999.

BOARD MEMBER

c: Paul S. McCausland, Wichita, KS
P. Kelly Donley, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director